

**INTERIM Final
(September 1997)**

WORKER PROTECTION STANDARD PENALTY POLICY

AN APPENDIX TO THE ENFORCEMENT RESPONSE POLICY FOR THE FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT

Introduction

The FIFRA Worker Protection Standard (WPS), 40 CFR Part 156 Subpart K and Part 170, was published in 1992 and amended at 60 FR 21953, May 3, 1995, and 61 FR 33213, June 21, 1996. General guidance concerning enforcement of the FIFRA WPS is provided in the FIFRA Enforcement Response Policy (hereinafter FIFRA ERP), published July 2, 1990. In the *Overview of the Policy*, FIFRA ERP pg. 2, guidance on the appropriate enforcement response for violations of specific FIFRA programs such as, the FIFRA GOOD LABORATORY PRACTICE STANDARD, FIFRA § 19-RECALL REQUESTS, or FIFRA § 7(c) PESTICIDE PRODUCING ESTABLISHMENT REPORTING REQUIREMENTS, should be attached as additional appendices and used in conjunction with the overall FIFRA ERP. Consistent with the FIFRA ERP, EPA provides additional guidance on appropriate response to specific FIFRA WPS violations. This FIFRA WPS PENALTY POLICY (hereinafter WPS Penalty Policy or Policy) should be used in conjunction with the current FIFRA ERP.

Assessing the FIFRA WPS Enforcement Actions For Misbranding and Misuse Violations

Determining the Appropriate Recipient or Respondent. Case Development Officers should refer to document entitled GUIDANCE ON ISSUANCE OF WORKER PROTECTION STANDARD ENFORCEMENT ACTIONS IN RESPONSE TO PERSONAL PROTECTIVE EQUIPMENT VIOLATION, 60 FR 18100 (April 10, 1995) for criteria to consider when determining who the responsible parties are for violations of WPS requirements (Attachment 1). The Guidance identifies ten factors EPA recommends Federal and State officers consider when determining the appropriate party(ies) for a WPS enforcement action. A copy of the guidance should be kept with this WPS Penalty Policy. Periodic updates of the guidance may occur as changes in the industry and regulatory standard occur.

Levels of Enforcement Response Action

Enforcement of the WPS is governed by the FIFRA ERP, including this WPS Penalty Policy which addresses two primary WPS violation categories (but is not limited to): **§12(a)(1)(E) misbranding violations and §12(a)(2)(G) pesticide use violations.** This WPS Penalty Policy only addresses misbranding and misuse violations (see Attachment 2-A and Attachment 2-B) pursuant to 40 CFR §§ 156 (Subpart K) and 170. For other WPS violation

categories, such as §§ 12(a)(1)(B), 12(a)(2)(H), and 12(a)(2)(M), see the appropriate sections as addressed in the FIFRA ERP.

The FIFRA ERP directs that once documentation of a FIFRA violation is complete, appropriate action for the violation must be selected. Enforcement response levels include:

- Notice of Warning -- FIFRA §§9(c)(3), 14(a)(2) and 14(a)(4)
- Stop Sale, Use or Removal Order -- FIFRA §13(a)
- Seizure -- FIFRA §13(b)
- Injunction -- FIFRA §16(c)
- Civil Administrative Penalty -- FIFRA §14(a)
- Criminal referral, FIFRA §14(b)
- Formal and Informal Recalls, FIFRA §19.

Each enforcement response action level above is discussed in greater detail in the FIFRA ERP. Be sure to consult with the FIFRA ERP when completing the case development. Each of the misbranding and misuse violations for WPS are discussed in detailed in “FIFRA WPS charge and gravity level matrix,” Attachment 2-A and Attachment 2-B, respectively. Special attention is provided below in this Policy concerning Notices of Warning and the Civil Administrative Complaints.

Notice of Warning (NOW). FIFRA §§ 9(c)(3), 14(a)(2), and 14(a)(4) provide EPA with the authority to respond to certain violations of FIFRA with a NOW (see also, NOTICE OF WARNING, FIFRA ERP at pg. 4).

FIFRA § 9(c)(3). A NOW may be issued in lieu of a civil complaint as an appropriate enforcement response for minor violations. A minor violation generally consist of a combination of factors such as, low pesticide toxicity, lack of potential or actual harm or exposure to humans or the environment, absence of a prior FIFRA violation history and lack of culpability. A NOW may be issued to any registrant, commercial applicator, wholesaler or other distributor, as defined in FIFRA § 14(a)(1) (also known as a 14(a)(1) violator category). If the violation is determined “minor” with a gravity adjustment value of 3 or below, as defined by the FIFRA ERP (pg. 5) and TABLE 3: GRAVITY ADJUSTMENT CRITERIA (pg. 22 or C-1), a 14(a)(1) violator who violates any provision of FIFRA may receive a NOW. As always, the Case Development Officer and Attorney team must document the mitigating factors of the case that support this enforcement response.

FIFRA § 14(a)(2). FIFRA provides that a private applicator or other person that is not a registrant, commercial applicator, wholesaler or other distributor (also known as a 14(a)(2) violator category) shall receive a NOW for a first-time offense. However, this limitation does not apply to “for hire” applicators that hold or apply registered general-use pesticides or use dilutions of registered pesticides, and who provides a service (such as vector control) without delivering any unapplied pesticide to any person so served. Such a “for hire” applicator who violates any provision of FIFRA before January 30, 1997, may

be assessed a civil penalty of not more than \$500 or \$550 for any violation on or after January 30, 1997, for a first offense¹.

FIFRA § 14(a)(4). In all circumstances, EPA may issue a NOW in lieu of a civil penalty if EPA determines that the pesticide-use violation occurred despite the exercise of due care and the violation did not cause significant harm to health or the environment. The Case Development Officer and Attorney team must document the facts of the case that support this enforcement response.

Civil Administrative Penalties¹. Misbranding violations, with few exceptions, are subject to stop sale orders and civil administrative complaints, since the persons involved in the registration, production, sale and distribution of WPS-type pesticide products are covered under FIFRA § 14(a)(1). Persons covered under FIFRA §§ 14(a)(1) or 14(a)(2) who are involved in misuse violations, subject to the limitations above, may also be subject to civil administrative complaints.

FIFRA § 14(a)(1). On or after January 30, 1997, a registrant, commercial applicator, wholesaler, dealer or distributor may be assessed a civil penalty up to \$5,500 for each FIFRA violation. Before January 30, 1997, the civil penalty may be assessed up to \$5,000.

FIFRA § 14(a)(2). On or after January 30, 1997, a private applicator or other person (those not identified under FIFRA § 14(a)(1)), may be assessed a civil penalty up to \$1,100 for each FIFRA violation, except that a penalty up to \$550 for violations on or after January 30, 1997, may be assessed for a “for hire” applicator, after receiving a Notice of Warning or citation for a prior FIFRA violation. (Also review the FIFRA ERP pgs. 9, 10, 17) for further clarification of “for hire” and private applicators.) The prior violation may have been for the same or different FIFRA violation. Before January 30, 1997, the civil penalty may be assessed up to \$1,000 (for a private applicator) or \$500 (for a for-hire applicator).

The following examples demonstrate when a civil administrative complaint proposing civil penalties is usually appropriate:

- Where a violation presents actual or potential risk of harm to human health or the environment; or
- Where the violation impedes EPA’s ability to fulfill FIFRA goals or harms the regulatory program; or
- Where the violation resulted from ordinary negligence, inadvertence or mistake.

¹ Penalty assessments must take into consideration the CIVIL MONETARY PENALTY INFLATION ADJUSTMENT RULE, published on December 31, 1996 (61 FR 69361) and effective on January 30, 1997 (see Attachment 3 of the WPS Penalty Policy).

Determining the Appropriate Enforcement Response

In conclusion, the following chart summarizes when issuance of a NOW or a Civil Administrative Complaint is the appropriate enforcement response:

PERSON	FIRST VIOLATION	SECOND VIOLATION WITHIN FIVE (5) YEARS
Registrant OR Commercial applicator ² OR Wholesaler OR Dealer OR Retailer OR Distributor ¹	If gravity adjustment factor is 3 or below (minor violations)-->NOW under § 9(c)(3) If gravity adjustment factor is 4 or greater--> Civil Administrative Complaint for a §14(a)(1) violator category with a penalty amount up to \$5,000/violation if committed prior to 1/30/97, or up to \$5,500/ violation if committed on or after 1/30/97 ³	Civil Administrative Complaint for a §14(a)(1) violator category with a penalty amount up to \$5,000/violation if committed prior to 1/30/97 or up to \$5,500/violation if committed on or after 1/30/97 ²
Private applicator ¹	NOW for a § 14(a)(2) violator category	Civil Administrative Complaint for a §14(a)(2) violator category with a penalty amount up to \$1,000/violation if committed prior to 1/30/97 or up to \$1,100/violation if committed on or after 1/30/97 ^{2,4}
“For hire” applicator	Civil Administrative Complaint for a § 14(a)(2) violator category with a penalty amount up to \$500/violation if committed prior to 1/30/97, or \$550/ violation if committed on or after 1/30/97 ¹	Civil Administrative Complaint for a §14(a)(2) violator category for a penalty amount up to \$1,000/violation if committed prior to 1/30/97, or \$1,100/violation if committed on or after 1/30/97 ^{2,3} .

² Also see FIFRA ERP ASSESSING ADMINISTRATIVE CIVIL PENALTIES(pg. 17) and footnotes (pg. 10), regarding further discussions on distributors, and commercial, “for-hire” and private applicators.

³ Even if the Total gravity adjustment level is 4 or greater, and if the violation occurs despite the “exercise of due care,” and no “significant harm” occurs, a NOW under §14(a)(4) may be issued at any time.

⁴ Prior written warning or citation will be considered for any FIFRA violation.

Calculating the Penalty --- Step-by-Step

The following procedures are designed for use with the PENALTY CALCULATION SHEET which is the last page of this document.

MISBRANDING. As stated in the FIFRA ERP, once it is determined that a civil administrative penalty is appropriate, a separate civil penalty, up to the statutory maximum, shall be assessed for each independent violation of FIFRA (pg. 25). A violation is independent if it results from an act or failure to act which is not the result of any other act for which a civil penalty is to be assessed, or if the elements of proof for the violations are different. Dependent violations may be listed in the complaint, but will not result in separate civil penalty assessments.

An example of a dependent violation is multiple misbranding violations that occur on a single product label. If a single product label is misbranded in one way or ten ways, as defined by FIFRA § 2(q), it is misbranding of a single product label and considered a single violation of FIFRA § 12(a)(1)(E). As a single violation of FIFRA, the maximum civil penalty assessed is up to \$5,000 or \$5,500, depending on when the violation occurred.

An independent violation of misbranding occurs each time that a misbranded product is sold or distributed. For instance, if a registrant sells or distributes four separate shipments of one misbranded pesticide product, EPA may assess a civil penalty of up to \$20,000 or \$22,000 depending on when the violation occurred. Therefore,

$$\begin{aligned} \$5,000 \times 4 [\text{sales/distributions violations}] &= \$20,000 \\ &\text{- or -} \\ \$5,500 \times 4 &= \$22,000 \end{aligned}$$

MISUSE. Distinct acts giving rise to violations of the same provision of FIFRA are independently assessable charges, even if the violative acts occurred during one pesticide application. For example, if a handler employer misused a registered product by failing to provide proper warning information for the pesticide application, failing to provide personal protective equipment, and failing to provide decontamination supplies, then each of those failures to act would be a separately assessable violation of FIFRA § 12(a)(2)(G). Each violation is subject to a penalty of up to \$5,000 (before January 30, 1997) or \$5,500 (on or after January 30, 1997). EPA may assess a civil penalty of up to \$15,000 or \$16,500. Therefore,

$$\begin{aligned} \$5,000 \times 3 [\text{misuse violations}] &= \$15,000 \\ &\text{for violations committed before January 30, 1997} \\ &\text{- or -} \\ \$5,500 \times 3 &= \$16,500 \\ &\text{for violations committed on or after January 30, 1997.} \end{aligned}$$

To assist further with assessing multiple WPS misuse violations, consider the following categories as an area to assess a separate count: REI, POSTING, TRAINING, PPE,

DECONTAMINATION, and EMERGENCY MEDICAL ASSISTANCE. These areas are recommended as a guide for assessing multiple misuse violations. Inspectors and Case Development Officers should prepare and provide evidence to support that violations for each category was a separate and distinct act.

The following is a step-by-step approach for determining the penalty calculation using the statutory penalty factors and the gravity adjustment factors as applied to the facts of the case. Remember that each analysis conducted is on a case-by-case basis and the following is a general approach.

1. Determining the Statutory Violations: FIFRA § 12 - Unlawful Acts

- See the WPS Penalty Policy - Attachment 2-A and 2-B, and FIFRA ERP Appendix A
- Summary of violations --
 - § 12(a)(1)(E) - misbranding 40 CFR § 156, subpart K and § 170 incorporated by reference (NOTE: If there are other non-WPS violations, you may determine the penalty calculation by using the sample worksheet provided in the FIFRA ERP. Multiple violations (FIFRA and WPS) may be assessed on either sample worksheets.)
 - § 12(a)(2)(G) - misuse 40 CFR §§ 156 subpart K and 170, incorporated by reference
- Other non-WPS statutory violations may be considered for products that have WPS labeling requirements, but those are not WPS misbranding and misuse violations.

2. Determining the appropriate FTTS Code

- See the WPS Penalty Policy Attachment 2-A or 2-B; new FIFRA & TSCA Tracking System (FTTS) codes have been created for WPS - Specific violations, starting with 1EN under § 12(a)(1)(E) for misbranding and 2GB under § 12(a)(2)(G) for misuse. This will allow for better tracking of Agency and State FIFRA enforcement actions.
- For other FIFRA violations, consult the FIFRA ERP Appendix A

3. Determining the Gravity Level.

- For misbranding, see the WPS Penalty Policy - Attachment 2-A, FIFRA WPS CHARGE AND GRAVITY LEVEL MATRIX list the violations subject to 40 CFR Parts 156 and 170 for registered products bearing WPS Labeling. Misbranding violations fall under FIFRA § 12(a)(1)(E). The appropriate 40 CFR section is also provided. Each citation includes a unique FTTS Code. When the appropriate violation is determined, the gravity level associated with the violation in the last column is assigned.
- Reminder: FIFRA § 2(q) should also be reviewed to determine the appropriate statutory definition for misbranding violations since this will be cited in the complaint. Most often the definition of misbranding for WPS-related products fall under FIFRA §§ 2(q)(1)(F) and 2(q)(1)(G).
- For misuse, see the WPS Penalty Policy - Attachment 2-B. The same format applies with determining the gravity level.

4. Determining the Violator Category:

- See the WPS Penalty Policy - DETERMINING THE APPROPRIATE RECIPIENT OR RESPONDENT
- FIFRA ERP - pgs. 10, 17 and 18
- Summary of violators
 - § 14(a)(1) - registrant, commercial applicator, wholesaler or other distributor
 - § 14(a)(2) - private applicator or other person that is not a registrant, commercial applicator, wholesaler or other distributor; “for-hire” applicator

5. Determining the Size of Business Category:

- See the FIFRA ERP, Table 2 (pg. 20), to determine the appropriate violator category. If no supporting documentation is available to determine the violator’s size of business category, then the violation should be considered a size I business as stated in the FIFRA ERP (pg. 21). Other documentation include:
- Dun & Bradstreet report(s) - should be used for (14)(a)(1) violators but may not be for (14)(a)(2) violators;
- Securities Exchange Commission (SEC) 10K and 10Q financial reports - must be filed by companies that issue public stock.
- Since the size of business is generally determined from an violator’s gross revenues from all revenue sources during the prior calendar year, this information may not be readily available when the violator is an agricultural or handler employer. The Case Development Officer an/or Inspector should make attempts (in writing) to ask for appropriate documentation, such as tax returns, financial statements, *etc.*, from the violator. Those records are to be provided to the Agency at the violator’s expense and must conform to generally recognized accounting principles and procedures. If no response is provided, then the Case Development Officer and Attorney team should proceed with assessing the penalty and issuance of a complaint with the violation considered at a size I business category.

6. Determining the Base Penalty:

- See the FIFRA ERP, Table 1 (pg. 19) - for violations that occur before 1/30/97
- See the WPS Penalty Policy Attachment 3- CIVIL MONETARY PENALTY INFLATION ADJUSTMENT RULE ; December 31, 1996; 61 FR 69361), see Table A for violations that occur on or after 1/30/97.

FIFRA	Maximum penalty amount for violations that occur before January 30, 1997	Maximum penalty amount for violations that occur on or after January 30, 1997
§ 14(a)(1) -- GENERAL COMMERCIAL APPLICATORS, <i>etc.</i> [7 U.S.C. 1361(1)]...	\$5,000	\$5,500
§ 14(a)(2) -- PRIVATE APPLICATORS	\$500	\$550
- 1ST & SUBSEQUENT OFFENSES OR VIOLATIONS [7 U.S.C. 1361(2)]...	\$1,000	\$1,100

7. Evaluating the Gravity Adjustments Criteria:

- The gravity adjustment criteria are not to be used for training, recordkeeping or reporting violations as cited in the FIFRA ERP (pg. B-3, APPENDIX B FOOTNOTE number 1).
- In the FIFRA ERP, the gravity adjustment criteria consists of the gravity of harm (by the pesticide misbranding/misuse and harm to human health and the environment) and gravity of misconduct (which includes the compliance history and culpability). The WPS Penalty Policy has expanded this to consider circumstances that describe hazard, risk, and resulting injury to agriculture workers and handlers. When conducting an inspection and case development, these elements should also be considered.
- Gravity adjustment criteria also apply for misbranding violation. If unable to determine the harm to humans (item 7b and 7c), the default entered is “unknown” or “no known” facts to consider.

VIOLATION	Gravity Value	CIRCUMSTANCES
7a. Pesticide Toxicity	3	Failure to implement or comply with the WPS requirement involving a Toxicity Level I pesticide or pesticides associated with chronic health effects (mutagenicity, oncogenicity, teratogenicity, <i>etc.</i>). Signal Word “DANGER,” “EXTREMELY FLAMMABLE” or “FLAMMABLE.” Restricted Use Pesticide (RUP). Unregistered pesticide that requires WPS labeling.
	2	Failure to implement or comply with the WPS requirement involving a Toxicity Level II pesticide. Signal work “WARNING.”
	1	Failure to implement or comply with the WPS requirement involving a Toxicity III or IV pesticide. Signal work “CAUTION.” No known chronic effects.
7b. Human Exposure	5	Large number of agricultural employees exposed.
	3	Medium Number of agricultural employees exposed, or no known exposure resulting.
	1	Small number of agriculture employees exposed.
	0	No agricultural employees were exposed.
7c. Human Injury	5	One or more deaths or serious injury. Widespread serious injury incurred.
	3	One serious or more than ten persons with injuries incurred, or number and severity of injuries unknown.
	1	Fewer than ten persons with minor injuries incurred.
	0	No injuries incurred; no adverse health effects.
7d. Environmental Harm	Since the WPS is designed to protect human health, environmental harm is not considered here. For misbranding violations refer to the FIFRA ERP (APPENDIX B) to determine the gravity adjustment level for harm to the environment.	
7e. Compliance History⁵	5	§ 14(a)(1) violator category with more than one prior FIFRA violation <u>and</u> at least one gravity “level 1” violation; § 14(a)(2) violator category with more than two prior FIFRA violations <u>and</u> at least one prior gravity “level 1” violations.
	4	§ 14(a)(1) violator category with more than one prior FIFRA violation <u>and</u> no prior gravity “level 1” violations. § 14(a)(2) violator category with more than two prior FIFRA violations <u>and</u> no prior gravity “level 1” violations.
	2	§ 14(a)(1) violator category with one prior FIFRA violation. § 14(a)(2) violator category with two prior FIFRA violations.
	0	No prior FIFRA violations.
7f. Culpability	4	Knowing or willful violation of FIFRA ⁶ ; knowledge of the general hazardousness of action.
	2	Violation resulting from negligence, or culpability unknown.
	0	Violation was neither knowing nor willful and did not result from negligence. Violator institute steps to correct the violation immediately after discover of violation.

⁵ For factors in determining what a “Prior Violation” is, see FIFRA ERP, APPENDIX B, pg. B-3 (footnote 4).

⁶ See FIFRA ERP CRIMINAL PROCEEDINGS (pg. 12) and APPENDIX B FOOTNOTES (pg. B-3) for further clarification. Criminal proceedings may be considered for “knowing and willful” violations.

7g. Total Gravity: Add all the gravity adjustment values assigned for items 7a. to 7f.

7h. Percent Adjustment: See the FIFRA ERP TABLE 3 (pg. 22) for determining the enforcement remedy. Once the TOTAL GRAVITY value has been determined (item 7g.), select and enter the appropriate percentage adjustment.

7i. Dollar Adjustment:

- Once the percent adjustment (item 7h.) has been determined, calculate and enter the dollar adjustment per count or per product.
- The base penalty determined from the civil penalty matrix (item 6) can be increased to the statutory maximum of \$5,500 or \$5,000 per violation for persons under FIFRA § 14(a)(1) and \$1,100 or \$1,000 for persons under FIFRA §14(a)(2), depending on when the violation occurred.
- If the base penalty on item 6 is already assigned the statutory maximum, then enter a “0” value.

8. Base Penalty after Adjustments: Calculate and enter the final penalty amount per count or per product, as appropriate.

9. Total Proposed Penalty: Add each amount from item 8 for the combined total.

10. Ability to Pay:

- See the FIFRA ERP ABILITY TO CONTINUE IN BUSINESS /ABILITY TO PAY (pg. 23), which discusses three methods that can be used to determine a violator’s ability to pay depending on the specifics of the case.
- If information is available in whole or in part, to determine a violator’s ability to pay, then that ability can be considered and entered to the penalty calculation worksheet.
- If no information is available at the time the penalty calculation is performed, then the full adjusted penalty should be assessed in the compliant.
- Ability to pay issues should then be considered in settlement, should the violator provide the required information.